Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

No. 93-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss or for summary judgment based on an assertion of qualified immunity?

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct," as opposed to persuasive circumstantial, evidence of unlawful motive?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 6 F.3d 789. The concurring and dissenting opinions on petitioner's suggestion for rehearing *en banc* (Pet. App. 64a-75a) are reported at 17 F.3d 1525. The opinion of the district court (Pet. App. 44a-63a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. Pet. App. 79a. A timely petition for rehearing was denied on April 1, 1994. *Id.* at 64a-

75a. The petition for a writ of certiorari was filed on June 22, 1994, and was granted on January 20, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rules 8(a), 9(b) and 56 of the Federal Rules of Civil Procedure are reproduced at Pet. App. 76a-78a.

STATEMENT

1. Several weeks before the 1988 Presidential election, petitioner, an inmate in a federal correctional facility, agreed to provide an affidavit to a reporter detailing potentially damaging allegations about the Republican candidate for Vice President. CA App. 79. When the reporter sent a copy of the affidavit to the Bush-Quayle Campaign, the Campaign's Deputy Press Secretary, Mark Goodin, promptly alerted Campaign Chairman James Baker that "[t]here's an issue that has come up that I think requires your attention." *Id.* at 100. Goodin also

showed the affidavit to Stuart Spencer, Senator Quayle's Campaign Manager, Lee Atwater, Bush-Quayle Campaign Manager, and other senior officials of the campaign; and he "made it very clear" that "it was something that we needed to take seriously and deal with seriously because of its potential for adverse publicity." *Id.* at 99A, 103, 171.

On Thursday, November 3, 1988, NBC News requested permission from the Bureau of Prisons to interview petitioner.[1] When the Bureau initially refused to permit an interview until after the election, NBC replied that it would broadcast petitioner's allegations "with the additional twist that the Bureau was preventing the interview until after the election to protect the Quayle candidacy." *Id.* at 94. Respondent Quinlan, the Director of the Bureau, allowed the interview to proceed (with the expectation that it would not air). As he has acknowledged *(id.)*:

> Kimberlin's fundamental lack of credibility, and the likelihood of unnecessarily precipitating a "cover-up" story just before the election, were major factors in the decision to permit the original NBC interview on an earlier schedule than El Reno had originally proposed. That judgment has been borne out by the fact that no news outlet carried the story in the pre-election period.

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[1] Bureau regulations authorize on-camera interviews of prison inmates. 28 C.F.R. § 540.62(b). The regulations require the warden to approve or disapprove the interview within 24 to 48 hours of the request. 28 C.F.R. § 540.63(f).

NBC conducted a forty-five minute interview with petitioner the next morning, Friday, November 4, 1988. It was subject to continuous auditory supervision by the Executive Assistant to the Warden (*id.* at 49), although Bureau regulations provided: "Interviews are not subject to auditory supervision." 28 C.F.R. § 540.63(j). As Director Quinlan anticipated, NBC did not broadcast the interview. CA App. 94.

Upon learning of the NBC interview, several other reporters contacted the prison on November 4 requesting to interview petitioner. *Id.* at 67; App., *infra*, A4. "[T]he Acting Warden suggested that a joint interview be set up to reduce the strain on institution resources of handling each interview separately." CA App. 67. In his view, a single group interview would best accommodate the press request consistent with prison management and security. *Id.* Bureau regulations authorize the wardens to schedule group interviews. 28 C.F.R. § 540.63 (h) (4).[2]

The prospect of a "group interview" created a sense of urgency at Bush-Quayle Campaign headquarters because of the belief "that it was just a question of time before this story broke . . . ." CA App. 104A. The Campaign's Deputy Press Secretary called respondent Miller, Director of Public Affairs at the Department of Justice, and "noted the obvious: that the closer to the Tuesday election that the story

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[2] The Bureau's regulations provide that the Warden may "[l]imit the amount of audio, video, and film equipment or number of media personnel entering the institution if the Warden determines that the requested equipment or personnel would create a disruption within the institution." 28 C.F.R. § 540.63(h)(4).

were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle chances." *Id.* at 85. The campaign official specifically complained that "[t]his Kimberlin fellow apparently is going to have a press conference. I'm amazed." *Id.* at 105. Respondent Miller answered: "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." *Id.*

Communications to and within the Department of Justice continued. Campaign officials contacted the Bureau of Prisons directly. *Id.* at 96. In addition, respondent Miller contacted the Bureau. *Id.* at 82. He also alerted the Executive Assistant to the Attorney General, Robin Ross. *Id.* at 170 n.12; Pet. App. 54a.

Director Quinlan stepped into the situation by taking some extraordinary actions. First, he countermanded the Acting Warden's decision and personally canceled the group interview. CA App. 95; App., *infra*, A5. Then, at approximately 11:00 p.m., on Friday, November 4, respondent Quinlan, in an unprecedented move for a Director, ***personally*** ordered petitioner locked into an isolated, cramped detention cell known as "the hole." CA App. 170, 73; App., *infra*, A6. While confined, petitioner was denied use of the telephone, isolated from the general population and stripped of all normal privileges, in violation of Bureau regulations.[3] CA App. at 76. For most of his time in isolation,

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3 The applicable regulation provided: "The Warden shall establish procedures for allowing inmates in . . . segregation status to make phone calls . . . ." 28 C.F.R. § 540.105 (1988).

petitioner was not permitted to use the telephone at all. An order provided: "NO! MORE PHONE CALL FOR THIS INMATE, per Lt. Garvue." *Id.* at 87.

In the history of the Bureau of Prisons, "this was the first time that the Director, who oversees some 45,000 federal inmates nationwide, had made a decision to place an inmate in one of the many institutions under his control in administrative detention." Pet. App. 54a. The Director's orders were carried out by officials who wrestled petitioner from his room, handcuffed him, "wheelbarrow marched" him to detention in a painful, hunched over position, denied him proper clothing, and subjected him to a strip search. *Id.* at 23a.

Petitioner was momentarily released from detention the following evening, Saturday, November 5, because a reporter told the Department of Justice she would broadcast his allegations unless he were released (CA App. 84):

> [The reporter] strongly implied that there was a quid pro quo here -- that we had better let him out of solitary (our prison authorities called it "detention," I believe) or we would trigger an NPR report publishing Kimberlin's allegations about Quayle. . . .
>
> . . . .
>
> I [respondent Miller] did relate to the bureau virtually everything [the reporter] had just told me.

Upon his release, petitioner made plans to telephone a group of reporters assembled at a hotel in

Washington, D.C. at 10:00 a.m. on the day before the election, Monday, November 7. *Id.* at 74; App., *infra*, A9. Bureau officials discovered these plans by wiretapping petitioner's telephone conversations. *Id.* at. 68-69; Pet. App. 55a. Respondent Miller has acknowledged that, "by that stage of the game, the prison authorities were monitoring all" of petitioner's telephone calls. CA App. 85. On the day before the election, the prison sent to respondent Quinlan seven tape cassettes containing recordings of petitioner's telephone conversations, including conversations with reporters. *Id.* at 111.

The Deputy Press Secretary of the Bush-Quayle Campaign communicated his concern about petitioner's plans directly to respondent Miller (*id.* at 85):

> On Sunday, Goodin told me that instead of staying in the campaign office -- his normal role -- he planned to spend Monday traveling with Quayle during his final day of campaigning, to take a direct hand in handling the media relations if the story of the Kimberlin charges should break. If that occurred, they planned to have Quayle immediately drop whatever he was doing and hold a press conference to deny the charges.

Petitioner's call to reporters "was never made, for Kimberlin was placed in detention before it could be made." Pet. App. 55a. This "detention, like the previous one, was ordered personally by Director Quinlan." *Id.* Petitioner was kept in detention until a week after the election. *Id.* at. 6a. On December 22,

1988, petitioner was placed in solitary detention a third time. *Id.* at 6a, 45a.

He filed an administrative claim under the Federal Torts Claim Act, which the Bureau of Prisons denied on June 19, 1990. CA App. 66-71.

2. On July 2, 1990, petitioner filed suit in the United States District Court for the District of Columbia against former senior Justice Department officials Quinlan and Miller. The complaint alleged a *Bivens* action for intentional violations of petitioner's First Amendment rights.[4] Respondents moved to dismiss the complaint or, alternatively, for summary judgment based on an assertion of qualified immunity. In accordance with the procedure for motions involving qualified immunity, the district court stayed all discovery relating exclusively to the *Bivens* claim and prohibited the taking of respondents' depositions.[5] Pet. App. 63a. Respondents contended they were entitled to immunity because petitioner allegedly failed to satisfy the "heightened pleading" standard

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[4] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint (App., *infra*, A1-A-19, also asserted claims under the Federal Tort Claims Act, 18 U.S.C. § 2511 (1988), the Fifth Amendment, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 (1988). The district court dismissed the Fifth Amendment claim as duplicative of the First Amendment claim, and a portion of the tort claim on grounds of venue; it denied respondents' motion to dismiss the Title III claim. Pet App. 57a-62a. These other claims are not before this Court.

[5] *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [the] threshold immunity question is resolved, discovery should not be allowed.")

that the District of Columbia Circuit created in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991). That standard requires a *Bivens* plaintiff to submit, prior to discovery, "direct as opposed to merely circumstantial evidence of the intent." *Id.*[6]

In opposition, petitioner submitted internal government documents, affidavits and other evidence that demonstrated respondents' unlawful intent in numerous ways: (1) by showing that respondents' proffered explanations for the confinements were false and contradicted by objective evidence; (2) by showing that respondents' explanation for their actions were repeatedly revised; (3) by showing that respondents were improperly influenced by at least one senior official of the political campaign; (4) by showing that, just before the detention, respondents barred petitioner from meeting with reporters because of the content of his speech; and (5) by showing that respondents' actions violated established Bureau regulations.

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[6] Respondents also contended that petitioner's First Amendment rights were not "clearly established." They have abandoned that contention. Long before the events in 1988 took place, this Court had established that "[p]rison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *see also Turner v. Safley*, 482 U.S. 78, 90 (1987) (prison rules must "operate[ ] in a neutral fashion, without regard to the content of the expression"); *Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987) (prison officials violated "clearly established constitutional rights" by locking an inmate into detention because of his statements).

Petitioner assembled substantial evidence that respondents' stated explanations for the repeated detentions were wholly pretextual. For example, respondent Quinlan answered Congressional inquiries about his actions by asserting that group press interviews violate Bureau "policy." CA App. 170; Pet. App. 54a. He did not identify the source of this policy and objective evidence shows that group interviews and press conferences were ***not*** against Bureau policy.

First, nothing in the Bureau's regulations prohibits group interviews or press conferences. To the contrary, the regulations leave the decision concerning the number of news reporters who may enter a prison to the discretion of the warden. 28 C.F.R. § 540.63 (h)(4). Here, the Acting Warden had already determined that a group interview was warranted and could be accommodated. Second, respondent Miller told the Bush-Quayle Campaign that it was "within [petitioner's] rights to have one according to the rules and regulations." CA App. 170; Pet. App. 54a. Similarly, the Justice Department's Deputy Director of Public Affairs advised the Campaign that "unless there was an immediate security concern, . . . it was within a prisoner's parameters" to have a group interview. CA App. 104. Third, the Bureau's former General Counsel has acknowledged that group interviews are not barred by Bureau policy and have been allowed in the past. *Id.* at 90. Fourth, reporters at the prison were told that the group interview was canceled because "***unforseen developments*** [had] come up since arrangements for the interview were set up [that] afternoon." *Id.* at 37 (emphasis added). The reporters

were not told that group interviews violated any existing "policy."[7]

Similar discrepancies undercut respondent Quinlan's purported justification for his order to place petitioner in administrative detention. He contended that a reporter communicated to the Department of Justice petitioner's fear for his own safety. *Id.* at 68, 78; Pet. App. 53a. That purported justification was flatly refuted by the reporter, Nina Totenberg, in a sworn declaration (CA App. 80):

> In one conversation with Miller, it became clear to me that the Department was using me as the excuse for the isolation -- that I was supposed to be the person who quoted Kimberlin as saying his life was in danger. I immediately told Loye Miller that was untrue and that I had never said any such thing.

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[7] Reporters were also given conflicting stories about the extent of internal discussion within the Department of Justice. In response to press inquiries, respondent Miller denied informing the Attorney General's Executive Assistant, Robin Ross, of the interviews and reversed course after learning that Mr. Ross had acknowledged the communication. As Miller wrote: "In his initial questioning, [a news reporter] pressed to know who above me at Justice had been informed about the Kimberlin affair as it unfolded through the weekend. I told him that I hadn't told anyone. Later he informed me that Ross contradicted that by telling [the reporter] that I had informed him about Kimberlin Friday afternoon. I conceded that Ross was indeed correct, that I had forgotten that I had talked to Ross, and that I stood corrected." *Id.* at 86A. In fact, respondent Miller had also informed others at the Department of Justice, including officials of the Bureau of Prisons.

Other circumstances surrounding petitioner's confinement show that it was not motivated by concerns for his safety. For example, petitioner was physically manhandled, handcuffed and strip searched (*id.* at 73; App., *infra*, A7; Pet. App. 54a), all of which is, as the district court observed, "inconsistent with administrative segregation as a protection for [petitioner's] own safety." *Id.* Even after petitioner expressly told local officials that he perceived no threat to his safety, they still kept him confined. CA App. 73-74. The Bureau later conceded, in response to petitioner's administrative claim, that his safety was not in fact threatened at all: "a further review of intelligence information again revealed no threat." CA App. 68. And, contrary to respondent Quinlan's answers to Congressional inquiries, respondent Miller has "vigorously challenge[d]" that concern for petitioner's safety "caused him to be slapped into detention." *Id.* at 84. Indeed, Miller viewed petitioner's supposed security concern as "hogwash." *Id.* at 85.

Similar discrepancies mar respondents' purported justifications for petitioner's extended second detention, *viz.*, alleged violation of prison telephone rules. Respondent Quinlan initially represented to the Associate Attorney General that petitioner's plan to call reporters was "irrelevant" to his confinement. *Id.* at 96. In response to subsequent inquiries from the United States Senate, respondent Quinlan stated that petitioner was confined because he made a "third-party" call (a call to one party who forwards it electronically to a third party). *Id.* at 78. Respondent Quinlan repeated this explanation in response to an inquiry from the House of Representatives. *Id.* at 108.

The Bureau eventually admitted that petitioner was detained and isolated this second time before the election to prevent him from calling the group of reporters. *Id.* at 68-69. In its letter denying petitioner's administrative tort claim, the Bureau stated:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington, D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention, to avoid a violation of our rules and protect the integrity of institutional security.

Id. Respondent Miller also acknowledged this as the true reason for the confinement: "The Bureau of Prisons caught on that he was going to hold another press conference, . . . so they put him back in." *Id.* at 90, 172. Miller further stated: "It was certainly my understanding at the time that it was this attempt to hold an unauthorized press conference which directly caused him to be segregated once again." *Id.* at 86.

Petitioner also pointed out in the district court that, contrary to respondents' contentions, Bureau regulations do not prohibit inmates from telephoning a group of reporters. Bureau officials, have acknowledged that "inmates certainly are allowed contact with the media, either through written correspondence or by telephone" and that "[a]n inmate can make telephone calls to media representatives." *Id.* at 148, 153.

Bureau regulations cast further doubt on respondents' explanation for the confinement. Those regulations do not permit segregation as a sanction for making a "third-party" call. 28 C.F.R. § 541.13 (1994); Pet. App. 55a. Moreover, the regulations require a prior hearing and finding of guilt before an inmate may be locked into isolation, unless the inmate poses a substantial security risk to the prison pending such a review. 28 C.F.R. § 541.22(a).[8]

3. The district court denied respondents' motion for qualified immunity. Pet. App. 44a-63a. First, the court held that it was clearly established prior to November 1988 that "federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech." *Id.* at 47a. The district court then turned to the sufficiency of petitioner's allegations when assessed under the "heightened pleading standard" articulated by the District of Columbia Circuit in *Siegert v. Gilley*. In *Siegert*, the court of appeals ruled that in *Bivens* and § 1983 cases in which motive is an element of the alleged offense, plaintiffs must present "direct evidence" of intent. In the district court's view, the decision in *Siegert* left some ambiguity as to whether

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[8] As the district court explained: "An inmate may be placed in administrative detention pending investigation of alleged violation of prison regulations only 'when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution.' 28 C.F.R. § 541.22(a). Kimberlin apparently was not at any pertinent time period regarded as a serious threat in any of these respects." Pet. App. 55a n.14.

"direct" meant the exclusion of conclusory allegations or of all circumstantial evidence. The district court reasoned that *Siegert* did not depart from this Court's precedent establishing that direct evidence is no better, and is often less reliable, than circumstantial evidence. *Id.* at 52a. The court also noted the inherent impracticality of producing "direct evidence" of intent in any circumstances, let alone prior to discovery, and held: "it is unlikely that the Court of Appeals meant in *Siegert* to exclude from consideration any and all circumstantial evidence as that term is understood in the law of evidence irrespective of its specificity and concreteness." *Id.* at 52a n.9. Accordingly, the court concluded that *Siegert* requires a plaintiff to proffer "something other than mere conclusions, namely tangible allegations of concrete facts corroborative of his own subjective version of the events." *Id.* at 52a-53a.

In applying this standard to the record in this case, the district court held that petitioner's claims satisfied the heightened pleading standard set forth in *Siegert* and warranted denial of a motion to dismiss the complaint. The court scrutinized the allegations and evidence surrounding each of petitioner's periods of administrative isolation, including evidence contradicting respondents' explanations for their conduct. That analysis led the court to hold that petitioner's allegations are "sufficiently tangible, detailed, and nonconclusory" to survive summary disposition. *Id.* at 56a.

4. On respondents' interlocutory appeal, a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed and dismissed petitioner's *Bivens* claim. The panel

produced three separate opinions. The majority opinion written by Judge Henderson held that the "heightened pleading standard" enunciated in *Siegert* precludes reliance on circumstantial evidence alone; rather, it requires *Bivens* and § 1983 plaintiffs to produce, prior to discovery, "direct evidence" of unconstitutional motive. *Id.* at 12a-13a. Focusing solely on the absence of "direct evidence" of intent, the majority concluded that this action must be dismissed at the outset. In the court's view, petitioner's pre-discovery submissions constituted "mere" circumstantial or inferential evidence of respondents' unlawful efforts to silence him. *Id.*

Concurring separately, Judge Williams expressly criticized the "direct evidence" pleading rule imposed by circuit precedent. Among the numerous shortcomings he noted were: (1) the rule "appears completely arbitrary and unrelated to the strength of the plaintiff's case;" and (2) "the requirement would be fatal except in the rare case of the defendant's confession." *Id.* at 18a. For these reasons, Judge Williams found it "hardly surprising that the only circuits to consider [the District of Columbia Circuit's] direct evidence rule have rejected it." *Id.*

Judge Edwards dissented. In his view, the heightened pleading standard applied in this case is incorrect at two levels of analysis. First, he questioned whether the Federal Rules of Civil Procedure permit the judicial creation of heightened pleading standards in any type of case. *Id.* at 20a. Judge Edwards explained that this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), "casts doubt on the validity of ***any*** judge-made 'heightened

pleading' standard imposed in ***any*** context." Pet. App. 20a.

The second rationale for Judge Edwards' dissent was his conclusion that, even if a "heightened pleading" standard were permissible, the requirement of "direct evidence" of intent has "no foundation in reason or in the case law." *Id.* at 21a. He explained that "if one goes to bed and there is no snow on the ground, and one wakes up to find snow on the ground, the snow is powerful evidence -- albeit wholly circumstantial -- that it snowed while one was asleep." *Id.* at 39a. Conversely, "direct evidence can consist of something as incredible and unreliable as the testimony of a convicted perjurer who asserts that the defendant confessed his intent and motive to him." *Id.*

In this case, Judge Edwards found that petitioner had presented "powerful circumstantial evidence" that "overwhelmingly supports an inference that the defendants acted with unconstitutional motive." *Id.* at 28a, 39a. If the allegations and evidence in this case do not suffice even to obtain discovery, then the standard has been tilted too heavily against individuals seeking redress for violation of clearly established constitutional rights and will "prevent a plaintiff from overcoming the qualified immunity defense except in the most extraordinary circumstances." *Id.* at 41a.

The petition for rehearing en banc was denied, although more active members of the court favored rehearing than opposed it. *See* Pet. 10 & n.8; Pet. App. 69a. Six members of the court, including three who concurred in the denial of en banc review, voiced their disagreement with the circuit's direct

evidence rule. Judge Silberman, for example, in concurring in the denial of rehearing en banc, acknowledged that "[t]hose who criticize this circuit's direct versus circumstantial evidence distinction . . . have a logical point . . . ." Pet. App. 67a (citation omitted). Similarly, Judge Williams, joined by Judges Buckley and Silberman, acknowledged that "[t]he imperfections of our 'direct evidence' rule are plain to see." *Id.* at 65a.

In dissent, Judge Edwards, joined by Chief Judge Mikva and Judge Wald, described the circuit's pleading standard as supported by "neither logic nor law" (*id.* at 72a) and as "Kafkaesque" because it requires more at the pleading stage than is necessary to prevail at trial. *Id.* at 69a.

SUMMARY OF ARGUMENT

1. The decision below employed a standard that serves none of the purposes this Court's qualified immunity jurisprudence requires. This Court has repeatedly instructed that a delicate balance must be struck between the rights of victimized citizens to seek redress for constitutional wrongs and the need to protect government officials engaged in lawful discretionary acts from insubstantial lawsuits.

In contrast to the discerning analysis this Court has prescribed, the decision below employed a "direct evidence" standard that neither addresses nor satisfies the requisite balance. Under the decision below, meritorious complaints supported by powerful circumstantial evidence of defendant's unlawful intent will be dismissed (without even an opportunity for limited or "tailored" discovery)

solely because they lack "direct" evidence of state of mind. For a plaintiff with a substantial claim that his constitutional rights have been violated, that standard provides insufficient protection. Conversely, the "direct evidence" rule may also provide insufficient protection to a federal official who faces a claim brought by a plaintiff with extremely weak, but "direct," evidence of intent.

2. The "direct evidence" rule promotes incorrect results because it focuses on the wrong question, namely, the form of the evidence rather than its substance. Direct evidence is often no more reliable than circumstantial evidence. For that reason, circumstantial evidence has long been accepted as sufficient to prove claims in virtually every area of law. And, the one issue for which circumstantial evidence is most ideally suited is state of mind. It would, therefore, impose a Sisyphean burden on plaintiffs in *Bivens* actions to require "direct" evidence of intent while precluding all discovery.

These basic flaws in the "direct evidence" rule have resulted in its universal rejection by every other court of appeals that has considered it. In addition, five Justices of this Court have written disapprovingly of the standard applied in this case.

3. The "direct evidence" rule is not only incorrect, it is also unwarranted. The courts of appeals that have rejected the "direct evidence" standard have demonstrated they are well capable of resolving claims of qualified immunity in a manner conforming to this Court's instructions. Most telling, it has been the consistent position of the United States for more than five years that the "direct evidence" rule fashioned by the District of Columbia

Circuit is incorrect. In briefs filed in this Court, the two most recent Administrations have urged a different standard. As the branch of government most directly affected by the test for assessing qualified immunity claims in *Bivens* cases, this criticism is a powerful reminder that the functions of government do not require the "direct evidence" rule.

4. The "direct evidence" rule has no pedigree in the Federal Rules of Civil Procedure. Whether viewed as a heightened standard for pleading (Rules 8, 9) or a heightened standard for summary judgment (Rule 56), the Federal Rules leave no room for exceptions to be created in particular types of cases. This Court so held in *Leatherman* and that holding is fully applicable here.

5. As reflected in the experience of every other court of appeals and the urging of the United States, an appropriate balance can be struck to accommodate the conflicting concerns present in *Bivens* cases. The record in this case leaves no doubt -- and the Department of Justice so acknowledged in the court below -- that under any valid standard, petitioner's detailed, specific, nonconclusory allegations and evidence were more than ample to survive motions to dismiss or for summary judgment. The decision of the court of appeals is incorrect and should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED BY REQUIRING *BIVENS* PLAINTIFFS TO SUBMIT "DIRECT" EVIDENCE OF INTENT

A. The Decision Below Is Contrary To This Court's Perceived Need To Strike A Satisfactory Balance That Protects Both Citizens And Officials

The admittedly unprecedented actions by federal officials that silenced and punished petitioner's exercise of his clearly established First Amendment rights provides the backdrop for this Court to resolve the tension between two imperatives: preserving a remedy for victims of constitutional violations to seek redress and to deter future violations, and protecting government officials from frivolous lawsuits so they may perform their functions without undue concern over potential litigation. This tension would not exist if no government official ever abused his position by violating clearly established constitutional standards, and no plaintiff ever filed an unmeritorious lawsuit. Because reality falls short of that utopian ideal, the courts face the task of charting an acceptable course that permits constitutional violations to be remedied without unduly interfering in the lawful functions of government. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("Our cases have accommodated these conflicting concerns . . . ."); *Harlow*, 457 U.S. at 807 ("qualified immunity defense . . . reflect[s] an

attempt to balance competing values . . . ."); *Butz v. Economou*, 438 U.S. 478, 508-12 (1978).

The charting of that course requires acute sensitivity to valid concerns on both sides of the equation. A standard that too easily immunizes government officials will shield misconduct from meritorious claims. A standard that too easily dispenses with immunity will expose officials to the burdens of litigation and potential liability for frivolous claims.

Few violations strike more directly at the heart of our constitutional system than infringement of the free speech protections of the First Amendment. As this Court has recognized, there exists "a broad consensus" that restraints "imposed upon criticism of government and public officials, [are] inconsistent with the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).[9] That is because the

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[9] In the quoted portion of *New York Times Co. v. Sullivan*, the Court was commenting on the Sedition Act of 1798, ch. 73, 1 Stat. 596, "which first crystallized a national awareness of the central meaning of the First Amendment." 376 U.S. at 273. That statute was enacted with an expiration date shortly after the elections of 1800. It was used to prosecute critics of Federalist officials, including, for example, James Callender's calling President Adams a "hoary headed incendiary" and a "man whose hands are reeking with the blood of the poor, friendless Connecticut sailor," and Luther Baldwin's conviction "because he expressed a wish that a cannon shot had lodged in the president's posterior." James M. Smith, *Freedom's Fetters* 270, 340 (1956). *See* John C. Miller, *Crisis in Freedom* 107 (1951) (Congressman Matthew Lyon prosecuted for publishing a letter from a person in France that "urged Congress to commit President Adams to the madhouse"); *see also* Smith, *supra* at 211-20 (Callender); Thomas I. Emerson et al., *Political and Civil Rights in the United States* 35-38 (1967).

First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *Id.* at 270 (quoting Judge Learned Hand's opinion in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). Accordingly, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Consistent with that principle, this Court has observed that "'[j]ust as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.'" *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)); *see also Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

Beyond the constitutional imperative of the First Amendment, solicitude for the rights of individuals subject to governmental overreaching is particularly urgent in the federal prison context, where, as the government has advised this Court, "[t]he comprehensive control exercised by prison staff over the inmate population . . . carries with it the risk that staff members may at times abuse their authority and violate inmates' constitutional rights." Government Amicus Brief on Cert. Petition at 3 ("Gov't Pet. Am."). For these and other victims of constitutional abuses it is often "damages or nothing." *Bivens*, 403 U.S. at 410. *See Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the

only realistic avenue for vindication of constitutional guarantees.").

Given these necessary constitutional concerns, the court below employed a standard that tilts the balance too heavily in favor of protecting official misconduct from judicial scrutiny. Under the court of appeals' standard, a claim of qualified immunity would shield even the most pernicious cabal to silence political critics or to deprive citizens of constitutional freedoms in the absence of "direct evidence." Indeed, the court below would immunize the members of that hypothetical cabal from submitting to discovery even in the face of overwhelming circumstantial evidence of wrongdoing and wrongful intent.

In place of the "direct evidence" standard employed below, other courts of appeals, this Court, and the Executive Branch in the two most recent administrations have employed a balance that more faithfully accommodates both sides of the qualified immunity equation. Under a more balanced and discerning standard, it is clear that the dismissal of petitioner's *Bivens* action should be reversed.

B. This Court's Discerning Approach To Qualified Immunity Requires Reversal

This Court's decision in *Bivens* is rooted in the reality that victims of constitutional wrongs are often powerless and remediless. 403 U.S. at 410. At the same time, *Bivens* did not strip federal officials of their historic immunity from suit. That immunity is qualified, not absolute. As the Court has made clear: "For executive officials in general . . . our cases make plain that qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. *See Mitchell v. Forsyth*, 472

U.S. 511 (1985); *Butz*, 438 U.S. 478. In establishing qualified immunity, the Court relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, 438 U.S. at 507.

In *Harlow*, the Court addressed the ramifications for qualified immunity in cases where the parties disputed the official's knowledge of the relevant constitutional standard and, hence, his intent to violate the standard. The Court concluded that factual inquiry into the defendant's subjective knowledge of constitutional norms was not warranted. An objective test -- whether the constitutional standard was clearly established -- more properly accommodated the plaintiff's constitutional protections with the official's entitlement to immunity for lawful conduct. Under the objective test articulated in *Harlow*, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. In an effort to weed out "insubstantial" cases prior to discovery and trial, the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Following *Harlow*, litigation in *Bivens* and § 1983 cases has been structured to address two fundamental questions: (1) did the challenged conduct violate a clearly established right; and (2) did the official engage in the challenged conduct. On the first question, *Harlow* precluded factual inquiry into

subjective intent. But, that is not so with respect to the second question, as the government has advised the Court in this case: "[n]either *Harlow* nor this Court's other immunity decisions resolved the issue of how to treat cases in which a plaintiff's allegation of improper motive or malice is an element of the claimed constitutional violation and a qualified-immunity defense is raised." Gov't Pet. Am. 12 n.9.

Two years after the decision in *Harlow*, the United States Court of Appeals for the District of Columbia Circuit considered the question not addressed in *Harlow*. In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court first established the notion of a heightened pleading standard and held that, in cases in which the motive of government officials is an element of the claim, a plaintiff must assert nonconclusory allegations that support a claim of unconstitutional motive. *See id.* at 29. The court held that "[t]he allegations on this issue need not be extensive," but "they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response . . . ." *Id.* Nothing in *Hobson* suggested a need for direct evidence.

The "direct evidence" requirement first surfaced in a subsequent case, in which the District of Columbia Circuit ruled that a plaintiff was entitled to limited discovery in order to obtain the necessary evidence to defeat a motion for summary judgment: "more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated . . . ." *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1435 (D.C. Cir. 1987). The court specifically recognized that

the availability of a remedy in these cases would be "an empty gesture were we to impose a blanket restriction on ***all*** discovery prior to the resolution of the qualified immunity issue on summary judgment," because, if that were so, unlawful schemes would be uncovered "only in the unlikely event that a [defendant] volunteered the information, or the equally unlikely happenstance that an eavesdropper heard and reported what the [defendants] said." *Id.* at 1437 & n.24.

In subsequent cases, the court extended that ruling to bar discovery altogether. In *Whitacre v. Davey*, 890 F.2d 1168, 1171 n.4 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1938 (1990), the court "made clear that if a plaintiff failed to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." In *Siegert v. Gilley*, the court reiterated this expanded version of its heightened pleading rule yet again and concluded:

> [U]nder this court's heightened pleading standard, in order to obtain even limited discovery, [unconstitutional] intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

895 F.2d at 802. Thus, in six years the court's "heightened pleading" rule had evolved from the relatively benign rule of *Hobson* to a draconian proscription of all discovery in the absence of "direct evidence" of intent. *See* Pet. App. 29a-38a.

No matter how powerful the circumstantial evidence plaintiff submits, the claim will be

dismissed unless, without the aid of discovery, plaintiff presents "direct" evidence. That standard is contrary to both goals underlying qualified immunity. It neither weeds out insubstantial lawsuits nor protects legitimate actions against premature dismissal.

C. The "Direct Evidence" Standard Is Contrary To Settled Principles

By requiring constitutional plaintiffs to proffer "direct evidence" of intent, the court of appeals has established a litmus test that has nothing to do with the merits of a case or the validity of a qualified immunity defense. Most fundamentally, the standard crafted by the court below is contrary to this Court's longstanding recognition that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). In some instances, circumstantial evidence "may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). For at least 170 years, it has been the rule that circumstantial evidence may be just as probative as direct or testimonial evidence:

> [W]e are not to shut our eyes on circumstances which sometimes carry with them a conviction which the most positive testimony will sometimes fail to produce.

The Robert Edwards, 19 U.S. (6 Wheat.) 187, 190 (1821).

Requiring "direct evidence" is particularly inappropriate where, as here, defendant's state of mind is at issue. "An opposing party's state of mind is, by its nature, difficult to prove, and is most often proved by circumstantial evidence." Gov't Pet. Am. 14-15. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *United States Postal Service Board v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."). For that reason, this Court has endorsed the sufficiency of circumstantial evidence to prove intent in a wide variety of cases. As this Court noted in cases of fraud:

> [P]roof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.

Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983). Consistent with this view, Fed. R. Civ. P. 9(b) imposes a ***lesser*** pleading standard for allegations pertaining to state of mind: "Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

It has also long been accepted that intent is generally and necessarily proved with circumstantial evidence:

> [T]he state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot "ascertain the thought that has had no outward manifestation." But courts and juries every day pass upon knowledge, belief and intent -- the state of men's minds -- having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.

American Communications Ass'n v. Douds, 339 U.S. 382, 411 (1950).

Circumstantial evidence is entirely adequate to prevail at trial in civil rights actions. *See, e.g., Village of Arlington Heights*, 429 U.S. at 266 (circumstantial evidence is adequate to prove discriminatory intent); *Farmer v. Brennan*, 114 S. Ct. 1970, 1981 (1994) (Eighth Amendment case where Court held that proof of the requisite knowledge of prison officials was "subject to demonstration in the usual ways, including inference from circumstantial evidence"); *United States Postal Service Board*, 460 U.S. at 714 n.3 (unlawful intent in Title VII action, "[a]s in any lawsuit" is proved with either direct or circumstantial evidence); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (Title VII race discrimination case provable

with circumstantial evidence); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("discriminatory intent need not be proved by direct evidence"); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (circumstantial evidence of racial bias is sufficient to show Equal Protection violation in jury selection). *Cf. NLRB v. Erie Resistor Co.*, 373 U.S. 221 (1963)(circumstantial evidence is adequate in cases of employment discrimination against union); *see also Ferrer v. Zayas*, 914 F.2d 309, 312 (1st Cir. 1990) ("Direct as opposed to circumstantial proof of discrimination is not required . . . .").

In certain other areas of law, such as antitrust enforcement, "circumstantial evidence is [its] lifeblood." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973); *see also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). In other contexts, circumstantial evidence is recognized as the only way for the plaintiff to prove his or her case. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217 (1993) (Free Exercise clause case seeking to determine the motives of the community in barring killing of animals); *Michalic*, 364 U.S. at 330 (Jones Act); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508 & n.17 (1957) (Federal Employers' Liability Act).

Indeed, circumstantial evidence of intent is sufficient to convict a criminal defendant beyond a reasonable doubt. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 567 (1965) ("Louisiana surely has the right to infer the appropriate intent from circumstantial evidence."); *Holland*, 348 U.S. 121 (conviction affirmed in criminal tax evasion case where government's evidence was circumstantial); *The Robert Edwards*, 19 U.S. (6 Wheat.) 187 (conviction

affirmed under Collection Law). It should be more than adequate to survive a summary judgment motion in a civil *Bivens* case prior to discovery.

D. The Direct Evidence Standard Has Been Universally Rejected In *Bivens* Cases

The direct evidence standard has evolved in the District of Columbia Circuit into an insuperable obstacle to discovery in meritorious cases with strong circumstantial evidence. That result is so far afield from settled principles that it has been universally rejected elsewhere. Although this Court's decision in *Siegert* did not reach the merits of the District of Columbia Circuit's direct evidence pleading rule, the four Justices who addressed the rule flatly disapproved it. Justice Kennedy's concurring opinion states that: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the [District of Columbia Circuit] Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." 500 U.S. at 236 (Kennedy, J., concurring). Justice Marshall, in a dissenting opinion joined by Justice Stevens and Justice Blackmun, perceived that the direct evidence rule "effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim" and that there is "no warrant for such a rule as a matter of precedent or common sense." *Id.* at 246 (Marshall, J., dissenting).

In a more recent concurring opinion, Justice Kennedy, joined by Justice Scalia, recognized that

circumstantial evidence may overcome a claim of qualified immunity:

> [T]he question [of qualified immunity] may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case.

Wyatt v. Cole, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring).

In addition, all courts of appeals to consider the "direct evidence" rule have rejected it. The Seventh Circuit held: "[a]lthough the court of appeals' opinion in *Siegert* insisted that the plaintiff produce 'direct' evidence of the defendant's improper intent, we agree with Justice Kennedy['s concurring opinion in *Siegert*] that there is no principled difference between direct and circumstantial evidence." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) (citation omitted), *cert. denied*, 502 U.S. 1121 (1992). The unanimous panel observed: "Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed." *Id.*

The Ninth Circuit has also expressly rejected the standard employed below: "We disagree . . . with the District of Columbia that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial, evidence." *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991), *appeal after remand*, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994). The Sixth Circuit rejected a direct

evidence rule in *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989), holding that a plaintiff may rely on proof "that would be strong enough to allow a jury to return a verdict for her under appropriate instructions" and "it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof." Most recently, the Fifth Circuit rejected the direct evidence rule in *Tompkins v. Vickers*, 26 F.3d 603, 609 (5th Cir. 1994): "We agree with those Circuits that have rejected the argument that a plaintiff must produce direct evidence in a case such as this. Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent. . . . [R]equiring direct evidence would effectively insulate from suit public officials who deny an improper motive . . . ." Accordingly, "[t]he District of Columbia Circuit alone requires that a plaintiff plead and present direct as opposed to circumstantial evidence in these cases." Gov't Pet. Am. 13-14 (footnote omitted).

E. The "Direct Evidence" Rule Strikes An Incorrect Balance And Is Counterproductive To Its Stated Purpose

The universal criticism of the direct evidence rule stems not only from its unwarranted derogation of circumstantial evidence, but also from the rule's failure to advance its stated purpose of immunizing officials from frivolous cases. Instead of striking a balance that sifts the meritorious from the frivolous, the direct evidence rule disposes of cases on the wholly arbitrary basis of the ***type*** of evidence submitted. The form of evidence governs, not its substance. Thus, a weak, baseless case with

conclusory -- but direct -- evidence of intent will go forward. A strong case with substantial supporting evidence will be dismissed absent "direct" evidence of intent (without even affording the plaintiff an opportunity for discovery that might unearth elusive "direct" evidence of facts peculiarly within the control of defendant).

Perhaps no criticism of the direct evidence rule is more compelling than the disapproval of the Executive branch. *Bivens* cases challenge conduct by federal officials; accordingly, the United States has a direct institutional stake in the standards for pleading and proof and "an interest in protecting government employees from meritless and unduly burdensome litigation . . . ." Gov't Pet. Am. 1-2. Yet the two most recent Administrations have criticized the direct evidence rule and urged this Court to reject it. In its brief in *Siegert*, five years ago, the United States argued that

> [A]s this Court has recognized, "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), and we do not think the court of appeals' opinion [in *Siegert*], which focused primarily on the conclusory nature of petitioner's assertions, must be read to conflict with that holding.

CA App. 138.

And in its amicus brief supporting certiorari in this case, the United States stated that "the requirement of direct (as opposed to circumstantial)

evidence in this context is incorrect . . . ." Gov't Pet. Am. 14. In short, the party with the greatest institutional interest and the most extensive experience litigating *Bivens* cases attests to the error and lack of necessity or support for the standard employed below.

F. The Court Of Appeals Erred By Fashioning A "Heightened Pleading" Standard Contrary To The Federal Rules of Civil Procedure

A further infirmity in the decision below is the erection of a "heightened pleading" standard that is contrary to the Federal Rules of Civil Procedure and this Court's decision in *Leatherman v. Tarrant County*, 113 S. Ct. 1160. In *Leatherman*, a civil rights action against a municipality, this Court unanimously held that heightened pleading standards are "impossible to square" with the "liberal system of 'notice pleading' set up by [Fed. R. Civ. P. 8(a)]." 113 S. Ct. at 1163.[10] The holding in *Leatherman* rests on the plain language of the Federal Rules, which does not create distinctions based on the subject matter of the case or the identity of the defendant.

The same Federal Rules that governed municipal liability in *Leatherman* apply with equal force to *Bivens* cases, and the court of appeals' heightened

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[10] The heightened pleading standard struck down in *Leatherman* was similar to the one established by the District of Columbia Circuit in *Hobson v. Wilson*. The *Leatherman* standard required "'that the plaintiff's complaints state with factual detail and particularity the basis for the claim.'" 113 S. Ct. at 1163 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

pleading standard necessarily diverges from those rules. With reference to precisely the same District of Columbia Circuit pleading rule in *Siegert*, Justice Kennedy perceived that: "The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b)." 500 U.S. at 236 (Kennedy, J., concurring).[11]

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[11] Several courts of appeals and numerous district courts have concluded that the rationale of *Leatherman* precludes a heightened pleading standard in *Bivens* and § 1983 actions against individual government officials. *See. Baxter v. Vigo County School Corp.*, 26 F.3d 728 (7th Cir. 1994); *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994); *Tuite v. Henry*, No. 93 C 3248, 1994 U.S. Dist. LEXIS 1845, at **8-9 (N.D. Ill. Feb. 11, 1994) ("Just as the Federal Rules do not create an exception from Rule 8 for allegations of municipal civil rights liability, it seems consistent to conclude that they do not create such an exception for suits against individual government officials."); *McCallen v. Holland-Hull*, No. 93-3415, 1994 U.S. Dist. LEXIS 1364, at *3 (E.D. Pa. Jan. 27, 1994) ("[T]he Court's analysis [in *Leatherman*], one of basic statutory construction, applies with equal force in § 1983 cases against individual defendants."); *Batiste v. Colonial Sugars, Inc.*, No. 92-3513, 1993 U.S. Dist. LEXIS 6038, at *5 (E.D. La. May 5, 1993) ("There is no logical reason to limit *Leatherman's* holding to claims of municipal liability, as the same Federal Rules of Civil Procedure govern all claims arising under § 1983."); *Dodson v. City of Kenner*, No. 92-3530:E/6, 1993 U.S. Dist. LEXIS 6077, at *2 (E.D. La. May 5, 1993) ("Just as Chief Justice Rehnquist noted that Rule 9(b) makes no mention of municipal liability, this Court notes that the rule fails to mention claims against individual government officials."); *Mohid v. Wheatley*, No. 3:92-CV-2284-H, 1993 U.S. Dist. LEXIS 5285, at *8 (N.D. Tex. Apr. 20, 1993) ("Although the Supreme Court expressly refused to consider cases such as this one involving liability of an individual government official, its reasoning extends to the circumstances of this case . . . ." (citation omitted)); *Callaghan v. Congemi*, No. 91-1496, 1993 U.S. Dist. LEXIS 4819, at *17 (E.D. La. Apr. 8, 1993) ("The Supreme Court's reasoning in *Leatherman* . . . appears to sound the death knell for [the] requirement of heightened pleading in suits involving

When qualified immunity issues arise in *Bivens* and § 1983 cases involving intent, it is not uncommon that motions to dismiss and motions for summary judgment are conflated. It is equally at odds with the Federal Rules for a heightened pleading or "heightened production" requirement (*see* Pet. App. 9a n.8) to be imposed at summary judgment. Rule 56 creates no exception for *Bivens* cases, or civil rights cases generally. As Justice Kennedy explained in *Siegert*, the circuit's rule "departs also from the normal standard for summary judgment under Rule 56." 500 U.S. at 235 (Kennedy, J., concurring). For the same reasons set forth in *Leatherman*, there is no warrant for any such exception to Rule 56 to be judicially inferred.

Accordingly, in ruling on a motion to dismiss, all allegations of the complaint must be deemed to be true. *Leatherman*, 113 S. Ct. at 1161. In ruling on a motion for summary judgment, all inferences must be drawn and all doubts resolved in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A "firm application of the Federal Rules of Civil Procedure" (*Harlow*, 457 U.S. at 819 n.35; *Butz*, 438 U.S. at 508), provides ample latitude for resolving claims of qualified immunity. In addition to Rules 12 and 56, district courts may employ Rules 16, 26(b) and (c), and 37 to tailor a discovery program that will enable the immunity question to be litigated with

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individual government officials." (citation omitted)); *Sapp v. Cunningham*, 847 F. Supp. 893, 900 n.9 (D. Wyo. 1994) ("*Leatherman* effectively overrules this aspect of *Sawyer v. County of Creek*, 908 F.2d 663, 665-67 (10th Cir. 1990), where the Tenth Circuit endorsed a heightened pleading requirement.")

minimal burden on the defendant. Further safeguards against frivolous claims exist in Rule 11 and 28 U.S.C. § 1915(d). *See, e.g., Jackson v. Carpenter*, 921 F.2d 68, 69 (5th Cir. 1991); *In re Tyler*, 839 F.2d 1290, 1293 (8th Cir. 1988); *Dowell v. Tennessee*, No. 92-6125, 1993 U.S. App. LEXIS 11715, at *2 (6th Cir. May 18, 1993); *Franklin v. Murphy*, 745 F.2d 1221, 1227-29 (9th Cir. 1984); *Denny v. Hinton*, 131 F.R.D. 659, 667 (M.D.N.C. 1990), *aff'd mem. sub nom. Denny v. Elliott*, 937 F.2d 602 (4th Cir. 1991); *Elmore v. McCammon*, 640 F. Supp. 905, 910-12 (S.D. Tex. 1986). In short, there is no occasion to engraft exceptions and qualifications onto existing federal rules to achieve the fair and efficient adjudication of qualified immunity claims.

G. This Court Should Articulate A Standard That More Appropriately Balances the Competing Objectives

The Court need not proscribe all "heightened" standards to dispose of this case. Consistent with the views of the Executive branch, other courts of appeals have fashioned standards for pleading and summary judgment that more fairly and effectively weed out insubstantial lawsuits while permitting meritorious claims to proceed. Those courts have fashioned a threshold standard utilizing the formulation set forth in Justice Kennedy's concurring opinion in *Siegert*: to sustain a *Bivens* or § 1983 claim at the pleading stage a plaintiff must support allegations of wrongful intent with "specific, nonconclusory factual

allegations." 500 U.S. at 236 (Kennedy, J., concurring).[12]

Courts of appeals that have adopted this standard have employed it effectively to dispose of insubstantial lawsuits alleging improper motive. *See, e.g., Wicks v. Mississippi State Employment Servs.*, 41 F.3d at 996 (plaintiff failed to allege "particular facts showing behavior by [defendant was] motivated by racial animus"; "broad and wholly conclusionary allegations" are not sufficient); *Maxey v. Murray*, No. 93-17346, 1994 U.S. App. LEXIS 25262, at ** 4-5 (9th Cir. Sept. 7, 1994) (plaintiff alleging excessive force "has submitted no evidence that any force used against him was applied maliciously or sadistically for the purpose of causing harm"); *Branch v. Tunnell*, 937 F.2d at 1388 (plaintiff alleging that the defendant knowingly included false statements in a warrant affidavit, "ma[de] no effort to identify which allegations in [defendant's] lengthy warrant affidavit he challenges as untrue"); *Walker v. Trammel*, No. 92-2763, 1993 U.S. App. LEXIS 22909, at *8 (7th Cir. Aug. 30, 1993) (plaintiff alleging arbitrary confinement in disciplinary segregation did not submit any evidence contradicting defendant's sworn

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12 *See Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 996, 995 (5th Cir. 1995) (internal quotations omitted) (prior to discovery, plaintiff must "state with factual detail and particularity the basis for the claim," which, "if proven, would demonstrate that [plaintiff] violated clearly established statutory or constitutional rights"); *Branch v. Tunnell*, 937 F.2d at 1386 (prior to discovery, plaintiffs must "state in their complaint nonconclusory allegations setting forth evidence of unlawful intent"); *Elliott v. Thomas*, 937 F.2d at 344-45 (prior to discovery, plaintiff must produce "'specific, nonconclusory factual allegations which establish [the necessary mental state]'")(alteration in original).

affidavit providing justification for his actions); *Wright v. Jefferson County Police Department*, No. 92-6203, 1993 U.S. App. LEXIS 32556, at *10 (6th Cir. Dec. 8, 1993) ("[P]laintiff's sole allegation with regard to unconstitutional motive is that the police impounded his car because plaintiff's friend, starting 'running his mouth.'"); *Elliott v. Thomas*, 937 F.2d at 346 (plaintiff alleging that defendants sought to punish her on account of her speech offered "no reason other than her own suspicions to doubt the administrators' account of their reasons").

Where plaintiffs have produced "specific, nonconclusory factual allegations," the courts exercise their traditional authority under Fed. R. Civ. P. 56. Summary judgment may either be denied or the court may permit discovery tailored to assist further scrutiny of the qualified immunity defense where the plaintiff demonstrates a "plausible basis for a belief that discoverable materials exist that would likely suffice to raise a genuine issue of material fact . . . ." *Resolution Trust Corp. v. North Bridge Associates*, 22 F.3d 1198, 1206 (1st Cir. 1994). This Court's decisions clearly contemplate such permissible discovery. In *Anderson v. Creighton*, 483 U.S. at 646 n.6, the Court anticipated that "discovery may be necessary before [defendant's] motion for summary judgment on qualified immunity grounds can be resolved" and may be "tailored specifically to the question of [defendant's] qualified immunity." In its recent brief opposing certiorari in *Branch v. Tunnell*, the government commented that where the court permitted limited discovery before resolving the qualified immunity defense, it had followed "precisely the manner this Court specified in *Anderson v. Creighton*." Br. in Opp., No. 93-1327, at 8-9. This procedure fully protects defendants and

provides an additional safeguard against insubstantial lawsuits: no claim will proceed to discovery and trial unless at least three federal judges agree that it should (the district judge who denies summary judgment, and the majority of the court of appeals that affirms).

Under this "specific, nonconclusory" standard, petitioner plainly presented ample evidence to overcome respondents' motions. After reviewing the record, the district court held that petitioner's submission was "sufficiently tangible, detailed, and nonconclusory" to proceed. Pet. App. 56a. Indeed, the Department of Justice conceded in the court of appeals that under this standard "we agree that summary judgment was properly denied." Reply Br. for Appellants (D.C. Cir. No. 91-5315), at 2. As the district court held, the Department of Justice acknowledges, and the record fully warrants, under any standard other than the "direct evidence" rule, petitioner's *Bivens* claim should survive summary judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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March 1995